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# ADMINISTRATIVE LAW & REGULATION

## THE PRESIDENTIAL APPOINTMENT PROCESS AT THE BEGINNING OF THE 21<sup>ST</sup> CENTURY

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### *Introduction*

The quality of appointments to the executive branch has long been identified as a vital aspect of an administration's success. Of the many things about which he could worry at the beginning of his Presidency, for instance, the one that most worried Thomas Jefferson was who would serve in the executive branch of government: "There is nothing I am so anxious about as good nominations," he wrote as he was preparing to assume office. Yet, over the past several years, there has been growing consensus that the process by which the President appoints and the Senate confirms high level executive branch appointees has become so long and arduous that many potential appointees may decide that it is better to stay at one's law firm or investment bank than to uproot the family, sell the house, divest the portfolio and move to Washington, only to have to wait for months on end to be confirmed to a position that pays one-half of their private sector salaries.

Last November, the Presidential Appointment Initiative of the Brookings Institution (PAI) took out a full-page advertisement in several newspapers decrying the current state of the appointment process. The advertisement was signed by a large number of former appointees of both parties, and included luminaries such as former Senate Majority Leader Howard Baker, former Reagan Secretary of State George Shultz, former Clinton Secretary of State Warren Christopher, former Reagan White House Counsel Arthur Culvahouse Jr., and former Carter and Clinton White House Counsel Lloyd Cutler. It urged various procedural reforms to ease the burdens the process places on nominees.

### *The Importance of Personnel and the Costs of an Unwieldy Process*

The importance of personnel selection is not in controversy, although some experts place an especially high premium on it over other aspects of governance. The Heritage Foundation, which has produced extensive amounts of management advice as well as policy analyses for the executive branch, sums up the importance of personnel: "Personnel is policy."<sup>1</sup>

The problem is particularly acute in the American system of government where the civil service is overseen by a level of politically appointed "amateur" administrators who serve at the pleasure of the President and only in very rare cases will outlast him. More likely, several appointees will serve in any given slot during the President's tenure in office. As columnist E.J. Dionne notes, "no country is as dependent on 'citizen service' in its national administration." Accordingly, the civil service in the U.S. is diminished in a way unlike other industrial nations: "day-to-day civil servants who make the American government run do not enjoy the honor and prestige of their counterparts in France or Germany, Britain and Japan," Dionne notes.

One of the most obvious costs of a process that delays the filling of appointments is that many posts, even key

posts, can go vacant for long periods of time. A study conducted by the Century Foundation, for instance, found that in the spring of 1997 the U.S. lacked an ambassador to 15 important countries, including Canada (which had been without an ambassador for almost a year), Germany (10 months), Russia (five months), Japan (three months) and France (two months). At the same time, one-third of the most senior 750 positions in the administration were unfilled. Agencies particularly affected included the Federal Elections Commission, which was unable to muster a quorum for much of 1998, the Food and Drug Administration, which lacked a commissioner for a year and a half, and the Surgeon General's post, which went unfilled for years. The result is a bureaucracy run not by the President's accountable appointees, but mostly by unelected civil servants whose accountability is significantly weaker due to civil service protections.

An administration will frequently counter such a state of affairs by increasing use of a variety of tricks, such as making recess appointments, temporary appointments, and "acting" appointments to circumvent the Senate's confirmation process and the delays it can entail. As a result, the Senate is also ultimately weakened by the break down of the appointments process. President Clinton's use of these techniques reached the point where Congress passed a new law limiting their use in 1998. The law clarified the status of these types of appointees and the limits on the President's power in this regard, although it also ensured him a lot of flexibility as well. Congressional oversight is also impaired by a lack of politically accountable personnel in key executive positions. Administrations are reluctant to allow civil servants to testify at hearings and interact directly with congressional oversight efforts. By their nature, civil servants are cautious, and tend to err on the side of disclosing too little rather than too much. Without a political appointee in place to interact with Congress, it is more difficult for the legislative and executive branch to interact on a particular topic.

Management of executive branch personnel, administered by the second and third tier appointees (deputies, assistants and deputy assistants) is especially vital, according to Heritage, because it influences the President's overall ability to steer the government. Although management prowess is highly valued, most important is the appointee's "commitment to [the President's] policy agenda and their ability to advance, articulate and defend it." By doing so, it ensures that the actual decision-making will be done by the political appointees rather than the career civil servants, whose "credibility as neutral administrators of politically directed policies would be permanently compromised," according to Heritage. Other commentators generally concur in the importance of having the President's team in place in a prompt manner, and the dangers of having long standing vacancies in key roles.

If the President's ability to govern the executive branch of government is weakened because the Senate does not promptly consider and confirm nominees, his accountability to the American people is diminished. Rather than accepting the blame for poorly executed policy, the President can shift blame to the Senate for failing to promptly confirm his nominee. Colby College political science professor Calvin McKenzie likens the current confirmation process to a dysfunctional corporation in this regard:

Imagine this: after a lengthy search, you are aggressively recruited to lead a large corporation. The hiring committee tells you that it has chosen you because it admires your vision of what the company can become. It wants you to do whatever is necessary to increase the company's profit and ensure its future strength. This is a job you've been seeking, so you are anxious to start and begin thinking of the kinds of people you'll need to recruit to head up the company's important divisions.

But then the hiring committee says, "Oh, by the way, did we mention that all of your top personnel choices will have to be approved by a committee that includes some of your worst enemies, any one of whom can blackball any of your selections?"

Who would be willing to run a company under these conditions? Who would be willing to be held accountable for its performance?<sup>2</sup>

Next, a dysfunctional process reduces the quality of the appointees by reducing the talent pool. A recent article on the search for a new Securities and Exchange Commission Chairman, for instance, mentioned that two of the most prominent candidates had asked that their names be removed because they did not wish to undergo the confirmation process. Fewer candidates willing to undergo the confirmation process results in a smaller pool of appointees, and, in some cases, will mean that the most highly qualified person will not serve.

#### *A Widespread Perception of Breakdown*

The charge that the appointment and confirmation process has "broken down" and is in need of reform has become widespread in the views of many from both parties and other observers. There has been no shortage of study of the problem, particularly in the past two decades as the process has gotten more and more onerous and slow.<sup>3</sup>

The Presidential Appointment Initiative was founded at the Brookings Institute to provide a forum for study and discussion of the appointments process, and its deleterious impact on government service. Its goals are to provide a "pragmatic" and "non-partisan" reform agenda; offer assistance to nominees to help them through the process; and "rekindle an appreciation for public service" that the PAI claims has been dampened by the public's reluctance to serve given the workings of the appointment process. PAI has also produced reports on other aspects of government service that impacts its desirability, such as over-

rigorous ethics rules and low pay.

The Transition to Governing Project also examined many of these issues. In a three-year period, the project, which was based at the American Enterprise Institute and conducted jointly with the Hoover Institution, the Brookings Institution, and other think tanks, produced two major conferences and several publications. It was concerned more broadly with the problem of moving from campaign to governing mode for new administrations, but identified the appointment and confirmation process as significant impediments to getting a new administration up and running quickly.

In addition, the New Century Foundation conducted a study in 1996 entitled "Obstacle Course," followed up by a 1997 study that noted that "during 1997 the vacancy rate for top posts in the administration frequently exceeded 25%, reaching 30% at the end of August" and that "unless some positive action is taken to improve the presidential appointment processes, Americans will lose in two ways: the government will not be able to function efficiently and we will not be able to attract the best qualified people to these positions."

#### *Flaws in the Current System*

Although there is general agreement that the appointment process is functioning poorly, there is less agreement about the causes and, consequently, the solutions.

First, once a nominee is selected, he or she is immediately buried in paperwork, including many overlapping, duplicative questionnaires. Old records must be retrieved and significant amounts of very private records such as tax returns must be produced.

Next, a lengthy background check is conducted to ensure that the nominee has not engaged in illegal or unethical conduct that would provoke opposition and/or embarrass the administration that nominated him.

Some have identified problems in the Senate procedures that can delay a nomination once it reaches the Senate. The Senate's prerogatives and procedures are well known, and many view them as a positive in the legislative context. In contrast with the energetic House, which proposes many legislative initiatives, the Senate's pace is notoriously slow, and provides for "cooling." The same traditions, procedures and prerogatives in the context of the appointment process, however, have been the basis for criticism by some.

The first is the filibuster, by which any Senator can effectively block a vote on any nominee unless 60 members support cloture. The very threat of a filibuster is often enough to delay consideration of a nomination. In addition, filibusters are sometimes used to support a Senator's policy goals unrelated to the merits of the particular nominee. The next is the tradition of senatorial courtesy, which requires that a nomination have the assent of both of the nominee's home state Senators. Assent is signaled by the return of a blue slip of paper from both Senators, without which the nomination will not move forward. Finally, a committee chairman can, by virtue of their control over their committee's schedule, delay a nomination indefinitely by refusing to hold hearings or schedule a vote to report the nomination to the Senate for its consideration.

## *Proposed Solutions*

Given the differing views of what is causing the current problems with the appointment process, it is no surprise that there is a divergence of views on the proper remedies, which range from streamlining paperwork to proposals that arguably would require a constitutional amendment.

### Reforming Senate Rules

One set of reforms focuses on the Senate's rules and procedures. Barring the use of the filibuster and "holds"<sup>4</sup> when dealing with nominations is one suggestion. Another would require that the Senate provide every nominee with an up or down vote within a certain period of time. Both would, however, not only require a change to the written rules of the Senate, but its unwritten (and arguably more important) norm of unlimited debate.

### Constitutional Structure

One proposal would actually seriously reorder the current process by reviving the use of the legislative veto by turning the constitution's requirement that the Senate consent to a nomination into a requirement that it veto the appointment, stipulating that certain presidential appointments be deemed consented to unless the Senate affirmatively defeated it within a certain amount of time. Such a structure would likely be objected to by the Senate's minority, which currently can obstruct a nomination but cannot force a vote to be called. In addition, such a proposal raises obvious questions under the Supreme Court's decision in *Chadha v. INS*, although it does not deal with legislation.

### Streamlining the Preliminaries

Some suggestions focus on the process that occurs prior to a nomination being voted on, namely the investigation. First, some critics question the need to a "full field" FBI investigation on less significant nominations. Next, suggestions have been made that the FBI and other investigative agencies be temporarily augmented at times when nominations are expected to be particularly high, such as the start of a new administration and, perhaps, after midterm elections.

### Streamline the Disclosure Process

Another way of reducing earlier delays in the process, it is suggested, could be accomplished by streamlining the many and varied disclosure forms that applicants are required to fill out prior to their appointments.

### Fewer Presidential Appointments

Reducing the number of Presidential appointments would, correspondingly, reduce the impact that the deteriorating appointments process has on the operations of the federal government. For instance, in most other countries, ambassadors are chosen from the foreign service rather than made by political appointment. Promoting civil servants to more significant policy-making roles would arguably promote greater competence and experience, and reduce the tensions between the bureaucracy and its top leadership, now drawn from its ranks.

Such a development could create more problems than it would solve. It would significantly reduce the President's ability to run the executive branch and place what are, essentially, political decisions in the hands of

unelected officials whose removal would be difficult, or perhaps impossible, under current civil service laws.

### Fewer Confirmations

Some advocate reducing the number of appointees subject to Senate confirmation. Senate confirmation adds perhaps the bulk of the time to the delay in implementing an appointment. Saving Senate confirmations for more significant posts would speed up many appointments and reduce the opportunity for Senators to hold up non-controversial nominations over unrelated disputes. For that very reason, however, it would be unlikely that the Senate would consent to a significant reduction in the number of Presidential appointees subject to Senate confirmation.

### Fewer Hearings

Saving hearings for more policy sensitive posts rather than requiring every single nominee whose nomination is subject to Senate confirmation is a possible compromise between those who advocate reducing the number of appointees subject to Senate confirmation, and those who fear doing so would reduce the Senate's influence too much. Currently, hearings are the norm, even for many uncontroversial nominations. Rather than scheduling time for one Senator to gavel an empty committee room "to order," listen to a panel of nominees for some government board each read their five minute openings and respond with scripted answers to scripted questions, hearings could be reserved only for posts with the most significant implications or those nominations that were controversial for other reasons. If these situations became the norm for hearings, attendance at them might be greater if Senators realized that scheduling a hearing was no longer a matter of routine, but marked a confirmation hearing of significance. As a result, non-controversial nominees would face one less hurdle, while more controversial ones received greater scrutiny.

## *Conclusions*

Reforming the Presidential appointments process is an inherently political task. It will involve value judgments about the right blend of loyalty and competence, and which value will weigh more or less heavily.

\*Alec D. Rogers is a Republican Senate staffer. Any views expressed are solely his own.

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## **Footnotes**

<sup>1</sup> See, *inter alia*, Robert Moffitt, "Personnel is Policy: Why the New President Must Take Control of the Executive Branch," Heritage Foundation Backgrounder No. 1403, January 8, 2001.

<sup>2</sup> Calvin McKenzie, "Nasty and Brutish Without Being Short: The State of the Presidential Appointment Process," Brookings Review, Spring 2001, Vol. 19, No. 2, pp 4-7.

<sup>3</sup> For example, over the past 40 years the time to fill presidentially appointed positions has grown from 2.4 to 8.5 months. Only one out of 20 appointees took more than six months to confirm between 1964 and 1984. From 1984 through 1999, one in three took more than six months.

<sup>4</sup> "A senator's request that his or her party leaders delay floor consideration of a certain measure or presidential nomination. The majority leader usually honors a hold for a reasonable period of time, especially if its purpose is to assure the senator that the matter will not be called up during his or her absence or to give the senator time to gather necessary information." *American Congressional Dictionary*; Congressional Quarterly.